Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

83-1088

CASE NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

IN THE MATTER OF TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION,

Respondents.

PROCEEDING UNDER ARTICLE 78 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES TO ANNUL A SALES TAX ASSESSMENT. ON APPEAL FROM THE SUPREME COURT OF ALBANY COUNTY, STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

COUNSEL OF RECORD FOR PETITIONERS:
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SUPREME COURT OF THE UNITED STATES

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In the Matter of TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, individually and as members of the State Tax Commission,

Respondents.

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# JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Section 1138(a)(4) of the New York Tax Law requires that an individual, whom the New York State Tax Commission has determined to be personally liable for the sales taxes of a business organization

carried on in corporate form, make a cash deposit or file an undertaking in the amount of those sales taxes in order to obtain court review of the Tax Commission's determination. Is this section unconstitutional in that it deprives the individual of property without due process of law and denies the individual the equal protection of the laws in violation of the 14th Amendment of the United States Constitution?

2. Same question, with the fact added that the State Tax Commission, without explanation or justification, deliberately refused to produce one of its own employees who was a key witness, to testify and be cross-examined under oath at the State Tax Commission hearing which resulted in the above-described determination.

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## OPINIONS BELOW

Opinions not officially or unofficially reported (apparently), but included in the Appendix hereto.

## JURISDICTIONAL GROUNDS

This proceeding was timely brought under Article 78 of the New York Civil Practice Law and Rules for a judgment annulling a determination of the New York State Tax Commission in a sales tax matter.

The judgment sought to be reviewed was entered September 29, 1983 and notices of appeal were filed in the Supreme Court of the State of New York, Albany County, and the Appellate Division of the Supreme Court of the State of New York, Third Department on December 23, 1983. This Court is believed to have jurisdiction of this appeal pursuant to Title 28, United States Code, Section 1257(2).

## CONSTITUTIONAL PROVISIONS

This case involves Section 1 of the Fourteenth Amendment to the U.S. Constitution, which reads as pertinent: "...nor shall any State deprive any person of...property, without due process of law;...".

## STATEMENT OF CASE

In 1973, the New York State Tax Commission issued a wholly-fictitious sales tax assessment against petitioners, based not on any audit but on an arbitrary increase of exactly 20% over and above the amount of sales tax previously reported and paid by petitioner. The only justification for this wholly-fictitious assessment was the alleged failure of petitioners to cooperate with an auditor who, in 1969 or 1970, had begun but never finished an audit at petitioners' New York City office. Thereafter, and long after the period of limitation for the assessment of sales tax deficiencies had expired, an actual audit took place and in 1976 an actual assessment was issued. Petitioners thereupon applied for a hearing before the State Tax Commission.

At the hearing, held in 1980, petitioners Norman L. Stone and Richard Stone, president and treasurer, respec-

tively, of petitioner Top Tile Building Supply Corp. (Top Tile) testified at great length, under oath, that they had cooperated 1,000% with respondents' auditor, giving him a desk and office space to use and assigning a bookkeeper to assist him and informing him that he was free to come and go during business hours, namely 9:00 AM to 5:00 P.M., with or without appointment. Petitioners' officers also testified that this auditor spent a great deal of time at petitioners' office, but that his appearances became less and less frequent. He complained that he was simultaneously conducting numerous other audits, and eventually he abandoned the audit of petitioners' sales tax records altogether.

However, the State Tax Commission, despite repeated requests before during and after the hearing, refused to produce the aforesaid auditor to testify and be cross-examined at the hearing. Instead,

another auditor, unfamiliar with the case, who claimed to have spoken on the telephone to the aforesaid auditor, was put on the stand and testified that petitioners had not cooperated with the aforesaid auditor. When questioned about this, however, this other auditor turned aside all questions by claiming a lack of familiarity with the details.

In 1981 a determination was made by the State Tax Commission that petitioners owed approximately $34,000 in sales taxes for the years in question, 1968-1973, together with interest and penalties of approximately $58,000 for a total of $92,000. Petitioners thereafter commenced a proceeding in the Supreme Court of the State of New York in the nature of certiorari and prohibition, pursuant to Article 78 of the New York Civil Practice Law and Rules, to annul this determination. But they did not make a cash

deposit or file an undertaking with the court in the amount of the taxes interest and penalties allegedly owed, as required by §1138(a)(4) of the New York Tax Law as a precondition to court review of sales tax determinations of the State Tax Commission. The petition alleged that the deposit or undertaking requirement was unconstitutional under the 14th Amendment of the U.S. Constitution. The Supreme Court of the State of New York dismissed the petition for failure to comply with the deposit or undertaking requirement, and this judgment was affirmed by the Appellate Division, Third Department, which held that the cash deposit or undertaking requirement was constitutional. The New York Court of Appeals dismissed petitioners' subsequent appeal from the order of the Appellate Division, and judgment dismissing the petition was thereafter entered on September 29, 1983

in the Supreme Court of the State of New York.

STATEMENT OF REASONS

1. Petitioner Top Tile was at the time in question a New York corporation in the business of marketing home repair and improvement products at retail stores in New York State and Massachusetts. Petitioners Norman L. Stone and Richard Stone were officers of petitioner Top Tile considered to be personally liable for sales taxes of the vendor Top Tile because of their responsibilities, which included sales tax compliance. New York Tax Law §1131 and §1133. The petition alleges that since Norman L. Stone and Richard Stone do not have an excellent or "triple A" credit rating they would have to post cash in the amount of $92,000 to comply with the deposit or undertaking requirement of §1138(a)(4) of the New York Tax

Law. This would be an astronomical amount for petitioners Norman L. Stone and Richard Stone, and it bears no rational relationship to the income or property of these petitioners. This is because the basis for the sales taxes claimed to be due from the individual petitioners herein is not the income received or the property owned by them but rather the gross receipts of a chain of retail stores.

The cases cited in the opinions of the New York courts hold that §1138(a)(4) of the Tax Law is constitutional on its face. Matter of Driscoll v. State Tax Comm. (S.C. Albany 1980, October 28, 1980, Klein, J. affd. 86 A.D.2d 721, app. dsmd. 56 N.Y.2d 644, and see Western Elec. Co. v. Taylor, 1276 N.Y. 309 (1938), Matter of Hochman v. State Tax Comm., 68 M.2d 781 (S.C. Albany, 1971). None of these decisions contains an extended discussion of this issue, however. Federal cases

have also considered the use of such procedures. Phillips v. Commissioner, 283 U.S. 589 (1930); Flora v. United States, 357 U.S. 63 (1958) and 362 U.S. 145 (1960), and Dodge v. Osborne, 240 U.S. 118 (1916). But the hardship or financial burden imposed on the taxpayers in Phillips, Flora and Dodge was not comparable to that involved in the present case. Those cases involved the Federal income tax, the basis of which is, of course, the taxpayer's own income. In fact in Flora the court noted that if summary procedures were extended from income taxes to excise taxes, since excise taxes may be divisible into a tax on each transaction "...the full payment rule would probably require no more than payment of a small amount". Flora, supra, page 175, footnote 38. See also Steele v. U.S., 280 F.2d 89 (8th Cir. 1960). By contrast, the basis of the sales tax assessment herein, as noted, was not the

income of a single individual for a quarterly payroll period or even for one full year, but rather the gross receipts of a chain of retail stores over a period of six years. This could be a huge sum in relation to the cash flow and assets of one single individual, so it is plain to see why the New York Court of Appeals has described the deposit or undertaking requirement of §1138 of the Tax Law as an "...exacting prerequisite to judicial review..." Parsons v. State Tax Comm., 34 N.Y.2d 190, 197 (1974). In the instant case, as noted, petitioners would have had to obtain cash or similar assets in the amount of $92,000.

Finally, further note should be taken of Phillips v. Commissioner, supra, in which this Court addressed at length and specifically the due process standards applicable in tax cases. In an opinion by Mr. Justice Brandeis, the court made the

following observations regarding due process of law and summary tax collection procedures:

> "The procedure provided in section 280(a)(1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. (He may either pay the tax and sue for a refund or seek a redetermination before the Board of Tax Appeals [now the Tax Court] without first paying the tax. In the latter case) ...there is a complete hearing de novo according to the rules of evidence applicable in courts of equity of the District of Columbia. A review by the Circuit Court of Appeals of an adverse determination may be had; and assessment and collection may be stayed by giving a bond to secure payment." Page 599. (Bracket added).

The Phillips court also noted:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity for the ultimate judicial determination of the liability is adequate." (Phillips, supra, pages 596-597, underlining added).

In this connection it is noteworthy that in Phillips, court review was available without a bond, although one was required

to stay collection of the taxes. Phillips, supra, page 599.

Therefore, in petitioners' view, it is by no means clear that deposit or undertaking requirements are never constitutionally suspect on their face. In fact one New York case actually implied that the sales tax review bond itself might be unconstitutional if the tax were confiscatory or so large as to preclude the possibility of an appeal. Gordon v. Gerosa, 16 M.2d 710 (S.C.N.Y. 1959). Another New York decision squarely holds to this effect, in a case involving New York City cigarette tax assessments from which appeals could only be taken if a cash deposit or bond exactly similar to the bond required in New York State sales tax appeals was first posted. Sea Lar Trading Co., Inc. v. Michael, 107 M.2d 93, 100 (S.C.N.Y. 1980). The court said:

"The imposition of this condition of full payment of the tax, prior to the allowance of judicial review of the propriety of the determination after hearing, is tantamount to the preclusion of the right to due process.

"The rights of respondent to collect its taxes are maintained by his power to levy and seize assets; the requirement of full payment before resort may be had to the courts does not serve any further governmental interests.

"Since the only method open to petitioner to review this tax determination is through a proceeding in our courts, due process requires that this not be unduly burdened. (See Bodie v. Connecticut, 401 U.S. 371; cf. Lindsey v. Normet, 405 U.S. 56, 74-79.)" Page 100.

2. The original petition herein dated February 26, 1982 fully sets forth facts showing that the State Tax Commission hearing in this case was unfair and in contravention of due process of law.* This petition, as noted, alleges initially that the State Tax Commission made use of

* Only the original petition is considered in this Jurisdictional Statement.

a wholly-fictitious assessment, arbitrarily increasing petitioners' sales taxes by 20%, and used it to hold open the statute of limitations until an audit-based assessment could be made. Such wholly-fictitious assessments to extend the statute of limitations have been declared illegal. Brown v. State Tax Commission, 304 N.Y. 651 (1952) and see Slater v. Gallman, 38 N.Y.2d 1 (1975).

The State Tax Commission, however, sought to justify the use of this arbitrary assessment by falsely claiming that petitioners had refused to cooperate with one of their auditors. Consequently the crucial issue before the State Tax Commission was the issue of cooperation, and on this issue the hearing process was manipulated to produce the result desired by the State Tax Commission.

The express language of the original petition regarding this issue was as

follows:

"14. Pursuant to law, a hearing was held and evidence taken before respondents on January 31-February 1, 1980, after a petition was duly filed by petitioners herein, and a determination was thereafter made by respondents dated October 23, 1981, that petitioners owed $91,920 in taxes, including interest and penalties through December 14, 1981. Said determination, however, is not supported by substantial evidence on the entire record. Specifically, respondents' determination that petitioners had failed to cooperate with respondents' auditors was made as the result of arbitrary and capricious rules of evidence enforced by respondent State Tax Commission which rewarded respondent Department of Taxation and Finance for suppressing important material and decisive evidence and concealing the truth regarding petitioners' cooperation with respondents' auditors. Specifically, respondents refused to allow the auditor petitioners were accused of not cooperating with to testify at the aforesaid hearing.

"15. This determination of respondents upheld so-called estimated assessments made against petitioners in 1973 although said assessments were made illegally for the purpose of extending the statute of limitations and were nullities. This determination of respondents further upheld assessments made against petitioners in 1976 which were made illegally because barred

> by the statute of limitations. In upholding these assessments respondents were acting illegally and unconstitutionally and without authorization by the Tax Law of New York or any other statute or law. (Underlining added.)"

In the Grounds for Relief of this petition, the following language appears:

> "1. Petitioners claim the deposit and/or undertaking requirement of Section 1138 of the Tax Law of New York is unconstitutionally burdensome and discriminatory." (Underlining added.)

This portion of the gravamen and the grounds for relief in the original petition sufficiently alleges the unconstitutional deprivation of property. It is the combined effect of the unfair hearing and the undertaking requirement of §1138 of the Tax Law that petitioners are protesting. Such a combination of obstacles was held to violate due process of law by the Supreme Court of California in Brooks v. Small Claims Court of Los Angeles, 504 P.2d 1249 (S.C. Calif. 1973). That court

held:

> "...it is manifest that the requirement of an undertaking in connection with an appeal from a judgment entered in a small claims court constitutes a taking of property prior to a due process hearing..." P. 1253. (Emphasis added.)

To the same effect, see Bodie v. Connecticut, 401 U.S. 371 (1971).

This is a logical extension of the general rule of appellate rights, set out as follows in Ohio v. Akron Park District, 281 U.S. 74 (1929):

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." P. 80. (Emphasis added.)

The hearing afforded petitioners herein by the State Tax Commission involved a transparent, uniformly condemned violation of due process of law, namely denial of the right to confront an adverse

witness. This Court has repeatedly described this right as an immutable principle of our jurisprudence. Greene v. McElroy, 360 U.S. 474 (1958), Goldberg v. Kelly, 397 U.S. 254 (1970), Jenkins v. McKeithin, 395 U.S. 411 (1968) and Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963).

The grounds for relief on the original petition also contained the following statement:

> "4. Petitioners further claim the aforesaid civil fines or penalties of approximately $17,500 are unconstitutional, as set forth above, and that in seeking to collect them, respondents are proceeding without or in excess of jurisdiction, and to enforce a determination that was arbitrary and capricious, all in violation of petitioners' constitutional rights as set forth above, pursuant to Section 7803, subdivisions 2 and 3 of the Civil Practice Law and Rules."

It is an established rule that on a motion to dismiss, pleadings are to be liberally construed. Barber v. Rowe, 235 N.Y. 549.

And the facts alleged are to be deemed admitted and must be considered in the light most favorable to the pleader. Semple v. Miller, 38 A.D.2d 174 (4th Dept. 1972). This approach certainly seems warranted in Article 78 proceedings which must be brought within 4 months of the making of the challenged determination, very short notice. Section 217 New York Civil Practice Law and Rules. Viewed from this perspective, the petition clearly alleges facts constituting a violation of procedural due process of law.

The very basis of the concept of procedural due process of law is a reasonable opportunity for a fair hearing, and the petition gives respondents ample notice of petitioners' claim that the State Tax Commission hearing was procedurally flawed and that therefore the deposit and/or undertaking requirement of §1138 of the Tax Law is "unconstitutionally burdensome

and discriminatory." (Grounds for relief, petition, quoted above.) Petitioners believe the Appellate Division should not have converted this Article 78 proceeding into a declaratory judgment action, since the original petition adequately informed the respondents of petitioners claim that the unfair procedures followed by the State Tax Commission violated petitioners' constitutional rights. Petitioners therefore request this Court to find that it has power to review the constitutional issue herein, if deemed substantial.

Petitioners believe the constitutional question is worthy of this Court's attention. To explain; §1138 of the Tax Law imposing the preliminary requirement of a cash deposit or undertaking as a precondition to judicial review was enacted in 1965, effective April 10, 1967. L.1965, ch. 33, §1. This financial obstacle to appellate review has been described as an

"exacting prerequisite" by this Court (Parsons v. State Tax Commission, 34 N.Y. 2d 190 (1974) and as pointed out by one New York lower court, is not essential to the governmental interest because judicial review in itself does not prevent the State Tax Commission from pursuing its collection efforts. Sea Lar Trading Co. v. Michael, 107 M.2d 93 (S.C.N.Y. 1980). In fact in personal income and corporate franchise tax cases the legislature dropped the appeal bond requirement 20 years ago, and today judicial review of these taxes is available without a cash deposit or undertaking, although one or the other must be posted to stay collection of the tax. See New York Tax Law Sections 690(a) and 1090(a), (and former Sections 200 and 375).

More significantly, ten years after §1138 of the Tax Law was enacted, the State Administrative Procedure Act,

guaranteeing a fair hearing with the right of cross examination, was enacted. McKinneys New York Session Laws, L.1975, ch. 167, effective September 1, 1976. It is the passage of this law, applicable to the State Tax Commission (see National Elevator Ind. v. State Tax Commission, 49 N.Y.2d 538, 546-547, 1980) that creates the present controversy.

Petitioners' main argument is that state law may create property rights protected by the due process clauses of the state and federal constitutions, and that the State Administrative Procedure Act, guaranteeing an evidentiary hearing with the right to hear and cross examine adverse witnesses, is an example of such a law. This aspect of petitioners' argument goes back to the original intendment of the idea of due process of law, as described in an early decision of this Court, Davidson v. New Orleans, 96 U.S. 97 (1877)

as follows:

> "It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element." Page 102. (Emphasis added.)

This earlier opinion then goes on to describe the evolution of due process of law into a restriction on legislative as well as executive power. Davidson, supra, page 102. But the quoted portion makes clear the importance of the legislative role in formulating due process of law standards. This is the basis of petitioners belief that the New York State legislature has formulated a due process of law standard by guaranteeing a fair hearing to vendors prior to payment of additional sales taxes.

Such a fair hearing is, without a

doubt, guaranteed by §1138 of the New York Tax Law and by Article 3, particularly §306(3), of the New York State Administrative Procedure Act, applicable to the State Tax Commission. See National Elevator Ind. v. State Tax Commission, supra. The legislative intent of the State Administrative Procedure Act provides:

> "The legislature hereby finds and declares that the administrative... adjudicatory...processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the public.
>
> "It is further found that in the public interest it is desirable for state agencies to meet the requirements imposed by the administrative procedure act. Those agencies which will not have to conform to this act have been exempted from the act, either specifically by name or impliedly by definition." Section 100.

The Governor's Memorandum accompanying the new law also states:

> "The Act establishes uniform notice requirements to assure that any person will have an adequate opportunity to be heard, and it

> also prescribes standards of evidence for hearings." (Emphasis added.)

* * *

> "But the time has come for New York to acknowledge and accept the principle that the agencies of government must respond to the needs of the governed, not only substantively, but procedurally." (Emphasis added.)

In view of these clear expressions of New York State tax, fiscal and administrative policy, the State Tax Commission should not be allowed to justify its non-observance of the law guaranteeing petitioners herein a fair hearing on the grounds that a fair hearing may be dispensed with in view of the need to collect taxes as expeditiously as possible. The state legislature and not the State Tax Commission determines the tax, fiscal and administrative policies of New York State, and the state legislature has rejected this hard-line approach in all but jeopardy assessment cases. §1138(b) New

York Tax Law; Parsons v. State Tax Commission, 34 N.Y.2d 190 (1974); and see Article XVI, Section 1, Constitution of New York State.

More recent cases have expanded on this view. Hewitt v. Helms, 51 U.S. Law Week 4124, decided by this Court February 22, 1983, notes that ordinarily prison inmates are not entitled to a hearing prior to transfer from one type of detention to another, for example from the general prison population to more restrictive confinement, provided the latter type of confinement could be deemed encompassed by the inmate's original prison sentence. See Meachum v. Fano, 427 U.S. 215, 225 (1976). According to the opinion in the Hewitt case, courts are chary about subjecting prison administration to judicial oversight. This reluctance parallels the reluctance of courts to subject the administration of the tax laws to

judicial oversight. See Bull v. United States, 295 U.S. 247 (1935). (But while the authorities state that peremptory measures may be used to collect taxes, they add the qualification that laws providing for such peremptory measures must be strictly complied with, or the proceedings will be invalid. Corpus Juris Secundum, volume 85, section 686, page 1365; Cooley, "The Law of Taxation", op. cit., page 2619.)

However, in the Hewitt case, Pennsylvania state law, by mandatory language, gave hearing rights to inmates in connection with important decisions (such as transfers to more restrictive confinement) as opposed to routine decisions dealing with day to day prison operations. This Court expressed the view that this state law, providing mandatory hearing rights in such cases, gave rise to an interest in "liberty" protected by the due process clause.

This Court has often ruled that state law may create property interests protected by due process as well as liberty interests. Goss v. Lopez, 419 U.S. 565, 572-573 (1974) and Board of Regents v. Roth, 408 U.S. 564, 577 (1972). And it has to a degree rejected the historical distinction between personal liberty and property rights, which relegated the latter to a significantly inferior degree of constitutional protection. Lynch v. Household Finance, 405 U.S. 538, 552 (1970). (Arguably an injust taking of property amounts to a sentencing after the fact to forced labor equal in value to the cost of creating or acquiring the property.)

The Hewitt case, in light of the holding in the Lynch case that both "property" and "liberty" are important personal rights protected by due process of law, justifies the inference that state law may also create an entitlement to a

due process hearing as an adjunct to property rights as well as to liberty. This is petitioners' argument. In other words the guarantees of a fair hearing with the right of confrontation, contained in the State Administrative Procedure Act, and applicable to the State Tax Commission, supersede the cash deposit or undertaking requirement of §1138 of the Tax Law. Otherwise these §1138 requirements would render the State Tax Commission, unlike other agencies of state government, effectively immune from the fair hearing guarantees of the later-enacted State Administrative Procedure Act. Petitioners believe the issue of whether these fair hearing guarantees rise to the level of constitutionally-protected rights under the Hewitt case, supra, is a substantial issue for this Court's consideration.

## CONCLUSION

Wherefore petitioners respectfully request plenary consideration of their case by this Court.

Respectfully submitted,

LORENTZ W. HANSEN
Counsel of Record

Dated: December 26, 1983
White Plains, New York 10601

## APPENDIX

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

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IN THE MATTER OF TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

Petitioners,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, INDIVIDUALLY AND AS COMMISSIONERS OF THE STATE TAX COMMISSION,

Resspondents.

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES.

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(Supreme Court, Albany County Special Term, April 16, 1982. Calendar No. 33)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

Lorentz W. Hansen, for petitioners.

Robert Abrams, Attorney-General (Frank Dow of counsel), for respondents.

COBB, J.

In this article 78 proceeding, wherein the petitioners seek judicial review of the State Tax Commission's determination of October 23, 1981 which upheld, in part, and modified, in part, certain notices of determination of additional sales and use taxes said to be due

from petitioners, respondents move pursuant to CPLR 7804 (subd. [f]) to dismiss the instant proceeding upon the ground that it was not commenced within the four-month period described in CPLR 217 and section 1138 of the Tax Law and upon the further ground that the petitioners have failed to file the bond or deposit of the "amount of any tax sought to be reviewed" as demanded by section 1138 (subd. [a], par. 4) of the Tax Law.

Since it appears that the petitioners neither deposited the amount of tax at issue herein nor posted an appropriate undertaking as demanded by section 1138 (subd. [a], par. 4) of the Tax Law, this court lacks jurisdiction to entertain the instant proceeding and dismissal must be ordered whether or not it was timely instituted (Matter of J. C. Penney Co. v. New York State Tax Comm., 86 A D 2d 705). Accordingly, the dismissal motion will be granted.

Submit order on notice.

Dated: August 6, 1982

All papers to attorney for respondents.

Supreme Court—Appellate Division
Third Judicial Department

May 12, 1983 44363

In the Matter of TOP TILE BUILDING SUPPLY CORP. et al., Appellants,
v.
NEW YORK STATE TAX COMMISSION et al., Respondents.

Appeal from a judgment of the Supreme Court at Special Term (Cobb, J.), entered September 20, 1982 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to annul a determination of the New York State Tax Commission which upheld in part and modified in part notices of determination of additional sales and use taxes due.

Following a formal hearing, respondents modified in part (in petitioners' favor) notices of determinations and demands for payment of sales and use taxes due, and as modified, denied applications for revisions. Respondents' determination was made October 23, 1981 and, as appears from an affidavit in the record, the determination was served upon petitioners by certified mail sent the same day. These proceedings were commenced by service of a notice of petition and verified petition on February 26, 1982. Petitioners did not deposit the tax, penalty and interest due nor did they file an undertaking (Tax Law, § 1138, subd. [a], par. [4]). Special Term held that these omissions deprived the court of jurisdiction and dismissed the petition without reaching the issue of the timeliness of the proceeding.

Initially, we note that Special Term failed to address itself to those aspects of the petition which first attacked the constitutionality of section 1138 (subd. [a], par. [4]) of the Tax Law and, in the amended petition, alleged violation of due process in the manner respondents construed the statute. The court limited its decision to finding that failure to pay the tax at issue or post an undertaking deprived the court of jurisdiction. While an article 78 proceeding is generally the proper vehicle to determine whether a statute, ordinance or regulation has been applied in an unconstitutional manner (Matter of Overhill Bldg. Co. v. Delany, 28 N Y 2d 449, 458), the rule is different when the issue is the constitutionality of legislative action (Matter of Kovarsky v. Housing & Development Admin. of City of N. Y., 31 N Y 2d 184, 191). It has consistently been held that a proceeding under article 78 is not the proper vehicle to test the constitutionality of legislative enactments (Press v. County of Monroe, 50 N Y 2d 695,

702). However, this court may, and, in reliance on CPLR 103 (subd. [c]), does hereby remedy the procedural infirmity by converting the article 78 proceeding to a declaratory judgment action and thereupon reach the merits (Matter of Ames Volkswagen v. State Tax Comm., 47 N Y 2d 345). In our analysis, we find that this court has held that payment of the tax imposed and the filing of an undertaking are conditions precedent to the maintenance of judicial review of Tax Commission determinations and that non-compliance deprives the court of jurisdiction (Matter of J.C. Penney Co. v. New York State Tax Comm., 86 A D 2d 705, mot. for lv. to app. den. 56 N Y 2d 507; Matter of Cooper v. Tully, 79 A D 2d 757). Petitioners, in attempting to distinguish these two cases, contend that no constitutional issue appears to have been raised properly in either case. However, in Matter of O'Driscoll v. State Tax Comm. (Supreme Ct., Albany County, October 28, 1980, KLEIN, J., affd. 86 A D 2d 721, app. dsmd. 56 N Y 2d 644), the constitutionality of the statute was squarely before the court and was upheld (see Matter of Western Electric Co. v. Taylor, 276 N. Y. 309; Matter of Hochman v. State Tax Comm., 68 Misc 2d 781). Since it is conceded that petitioner has failed to comply with statutory requirements, there can be no judicial review.

Petitioner's remaining arguments directed to the validity of the assessment, the hearing, the determination itself, and the timeliness of these proceedings, need not be reached.

Judgment modified, on the law, by adding thereto a provision declaring that the deposit and undertaking requirements of section 1138 (subd. [a], par. [4]) of the Tax Law are constitutional, and, as so modified, affirmed, with costs to respondents.

MAHONEY, P.J., SWEENEY, KANE, CASEY and WEISS, JJ., concur.

A. Franklin
Michael E.
T. Paul
John T.
Leonard A.

# State of New York,
## Court of Appeals

*At a session of the Court, held at Court of Appeals Hall in the City of Albany on the* fifteenth *day of* September *A. D. 19* 83

**Present,** HON. LAWRENCE H. COOKE, *Chief Judge, presiding*

3 Mo. No. 735
In the Matter of Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone, Richard Stone, Appellants,
vs.
New York State Tax Commission, et al., Respondents,
For a Judgment &c.

---

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that the appellants are not aggrieved by the modification at the Appellate Division (CPLR 5601[a][iii]), and that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk of the Court

STATE OF NEW YORK

STATE TAX COMMISSION

| | |
|---|---|
| In the Matter of the Petition<br>of<br>TOP TILE BUILDING SUPPLY CORP. and NORMAN L. STONE and RICHARD STONE, Individually and as Officers<br>for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1967 through February 28, 1974. | DECISION |
| In the Matter of the Petition<br>of<br>TOP CARPET CORP. and NORMAN L. STONE and RICHARD STONE, Individually and as Officers<br>for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1967 through May 31, 1973. | |

Petitioners, Top Tile Building Supply Corp., Top Carpet Corp. and Norman L. Stone and Richard Stone, Individually and as Officers, 237 Mamaroneck Avenue, White Plains, New York 10605, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law. Top Tile Building Supply Corp. filed a petition for the period December 1, 1967 through February 28, 1974 (File No. 14362). Top Carpet Corp. filed a petition for the period December 1, 1967 through May 31, 1973 (File No. 14361).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1979 at 1:15 P.M. and was continued on January 31, 1980,

and on February 1, 1980. Petitioners appeared by Lorentz W. Hanson, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the assessments against petitioners are barred by the period of limitations provided for in section 1147(b) of the Tax Law.

II. Whether the field audit properly determined the sales tax due.

III. Whether Norman L. Stone and Richard Stone are personally liable for any taxes due pursuant to section 1131 of the Tax Law.

FINDINGS OF FACT

1. On November 8, 1973, the Audit Division, on the basis of an estimate, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Top Tile Building Supply Corp. ("Top Tile"), for taxes due of $82,985.77, plus penalty and interest of $30,596.35, for a total of $113,582.12. On April 2, 1976, the Audit Division issued an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Top Tile for taxes due of $24,520.02, plus penalty and interest of $19,717.47, for a total of $44,237.49. The notice dated April 2, 1976 was in addition to, and did not supersede, the notice dated November 8, 1973.

2. At the hearing it was stipulated that, with regard to Top Tile, the amount of tax at issue was $64,697.37.

3. On November 20, 1973, the Audit Division, on the basis of an estimate, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Top Carpet Corp. ("Top Carpet"), for taxes due of $13,262.09, plus penalty and interest of $4,373.11, for a total of $17,635.20. On April 2, 1976, the Audit Division issued an additional Notice of Determination

and Demand for Payment of Sales and Use Taxes Due against Top Carpet for taxes due of $3,011.72, plus penalty and interest of $1,825.04, for a total of $4,836.76. The notice dated April 2, 1976 was in addition to, and did not supersede, the notice dated November 20, 1973.

4. At the hearing it was stipulated that, with regard to Top Carpet, the amount of tax at issue was $7,775.43.

5. The audit of Top Tile and Top Carpet was originally assigned to the New York City District Office in 1970 where the offices of both petitioner corporations were located. The corporate offices were moved to White Plains and the corporations changed the location where their records were stored several times during 1971 through 1973. As a result, the audit was reassigned but never completed.

On October 26, 1973, the audit was assigned to Frances Schaeffer, an auditor in the White Plains District Office. She made an initial appointment with the vendors' accountant which was subsequently cancelled. At that time, the auditor mailed to Norman L. Stone, President of Top Tile, consents extending the period of limitations for both Top Tile and Top Carpet. The consents, dated October 29, 1973, were executed by Norman L. Stone and received by the White Plains District Office on November 5, 1973. Both consents extended the periods of limitation until December 20, 1974. Each corporation had previously submitted consents extending the periods of limitation in January 1971, October 1971, and November 1972.

Mrs. Schaeffer was of the opinion that the repeated transfer of the records indicated that the vendors were avoiding an audit. She discussed the matter with her supervisor and at his direction prepared estimated assessments against both corporations increasing reported sales by 20 percent.

6. In February, 1974, the audit was assigned to auditor Donald Bryant of the Albany District Office. Mr. Bryant began his examination on October 28, 1974, and submitted his reports on November 5, 1975. The audit procedures used were as follows:

(a) The first phase of the audit of Top Tile involved the selection of two (2) one-week test periods, February 1-6, 1969 and September 1-7, 1971. A one-week test period, September 1-7, 1971, was selected for Top Carpet. The sales records of each corporation were examined and it was determined that both Top Tile and Top Carpet owed additional sales tax for the test period in the amounts of $129.57 and $36.10 respectively. The result of the test period audits were used to calculate error ratios in the petitioner's reporting of sales tax. These error ratios were then projected over the full periods covered by the audits.

(b) In addition to using these test periods to calculate uncollected taxes, the auditor examined petitioners' daily sales sheets to determine unreported taxes. From these sheets the sales tax actually collected during the entire audit period was compared to the sales tax reported. It was determined that Top Tile had failed to report $31,951.45 in sales tax it had collected and Top Carpet had failed to report $2,625.69 in sales tax it had collected.

7. While the audits were being conducted, petitioners made their records available to Mr. Bryant. These included original sales invoices, original purchase invoices, purchase journals, ledgers, and daily cash sheets. Because the audit covered an extended period and involved records of numerous stores, the documents made available to the auditor were voluminous.

8. Top Carpet was formed for the benefit of former employees of Top Tile. No shares of Top Carpet stock were given to Norman L. Stone or to Richard

Stone. Top Tile provided bookkeeping and sales tax preparation assistance to Top Carpet. Neither Norman L. Stone nor Richard Stone were officers of Top Carpet.

9. Norman L. Stone was president of Top Tile and Richard Stone was treasurer of Top Tile. Both had major responsibility for the management and affairs of Top Tile.

CONCLUSIONS OF LAW

A. That the consent extending the period of limitations executed by Norman Stone on behalf of Top Tile in November of 1973 was valid since he was an officer of that corporation and as such was authorized to sign such a consent. Therefore, no portion of the assessment included in the Notice of Determination issued to Top Tile was barred by the period of limitations provided by section 1147(b) of the Tax Law. However, the consent extending the period of limitation executed by Norman Stone on behalf of Top Carpet was invalid since he was neither an officer nor was he a person authorized by that corporation to sign such a consent.

B. That the Audit Division was justified in issuing estimated assessments against Top Tile and Top Carpet in November, 1973, since petitioners had repeatedly delayed in making their books and records available.

C. That section 1147(b) of the Tax Law provides that "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return". Since the Notice of Determination was issued against Top Carpet on November 20, 1973 and since no valid consents extending the period of limitations were executed, that portion of the assessment against Top Carpet relating to taxable quarters prior to September 1, 1970, must be cancelled.

D. That "Although there is statutory authority for the use of a 'test period' to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law, §1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit...However, if records are available from which the exact amount of tax can be determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack of rational basis." Chartair, Inc. v. State Tax Commission, 411 N.Y.S.2d 41; therefore, the Audit Division was not justified in using the "test period" audit procedures described in Finding of Fact "6(a)" since petitioners had, by the time of the actual audits, made their books and records available to the auditor and these records were sufficient for determining the exact amount of tax due. Since these records were made available, only those portions of the assessments against Top Tile and Top Carpet which were based directly upon petitioners' records can be sustained. Those portions include the actual sales tax found to be due during the one and two week test periods of Top Carpet and Top Tile, and also the amounts of unreported sales tax as were discovered by the audit procedures described in Finding of Fact "6(b)".

E. That Norman L. Stone and Richard Stone were persons required to collect tax for Top Tile with respect to section 1131 of the Tax Law. Norman L. Stone served as President of Top Tile and Richard Stone as Treasurer. Both had major responsibility for the management and affairs of Top Tile.

F. That Norman L. Stone and Richard Stone were not persons required to collect tax for Top Carpet with respect to section 1131 of the Tax Law. Neither Norman L. Stone nor Richard Stone served as an officer of Top Carpet

C. That the petitions of Top Tile Building Supply Corp., Top Carpet Corp. and Norman L. Stone and Richard Stone, individually and as officers, are granted to the extent indicated in Conclusions of Law "C", "D" and "F"; that the Audit Division is directed to modify the notices of determination issued on November 8, 1973, November 20, 1973 and April 2, 1976; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
OCT 23 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

SUPREME COURT - COUNTY OF ALBANY

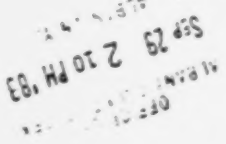
In the Matter of TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,
Appellants,
-against-
NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, individually and as members of the State Tax Commission,
Respondents.

JUDGMENT

INDEX NO. 3381-82

Top Tile Building Supply Corporation, Top Carpet Corporation, Norman L. Stone and Richard Stone, the Appellants herein represented by Lorentz W. Hansen, Esq., 175 Main Street, White Plains, New York 10601, having taken an appeal to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Appellate Division on the 13th day of May, 1983, and the Court of Appeals, after due deliberation, having rendered a decision on the 15th day of September, 1983, granting the Notice of Motion to Dismiss the appeal made by the appellants, ordering that the said motion to dismiss be and the same hereby is granted, with costs and twenty dollars costs of motion, and an order having been entered so affirming it is hereby:

ADJUDGED, that the aforesaid motion be, and the same hereby is denied, with costs of $85.00 to Respondents the New York State Tax Commission, the New York State Department of Taxation and Finance; James H. Tully, Jr., Milton Koerner, Thomas H. Lynch, individually and as members of the State Tax Commission, Executive Bureau, State



Campus, Tax and Finance Building, Albany, New York 12227, and that the Respondents have execution thereon.

Guy D. Paquin
Clerk

DATED AND ENTERED: Sept 29 1983

STATE OF NEW YORK
COUNTY OF ALBANY CLERK'S OFFICE } ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Judgment with the original thereof filed in this office on the 29 day of Sept. 1983 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 29 day of Sept. 1983

Guy D. Paquin Clerk

State of New York
Supreme Court - County of Albany

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In the Matter of TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

Petitioners-Appellants,

-against-

INDEX NO. 3381-82

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Commissioners of the State Tax Commission,

NOTICE OF APPEAL

Respondents-Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

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Sirs:

PLEASE TAKE NOTICE that the above named petitioners, Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone and Richard Stone hereby appeal to the Supreme Court of the United States from the judgment in the above-captioned matter entered in the Supreme Court, County of Albany, State of New York on the 29th day of September, 1983, pursuant to an order of the New York Court of Appeals dismissing the petitibners appeal to that court, and from each and every part of the aforesaid judgment. Said appeal is taken pursuant to Title 28 United States Code. Section 1257(2).

Yours, etc.

Lorentz W. Hansen

cc. Attorney General, State of New York
c/o Francis V. Dow
Assistant Attorney General
Department of Law
Albany, N.Y. 12224

Certificate of Attorney
Filed: Supreme Court
Albany County, New York
and Appellate Division
Third Department
December 23, 1983

Lorentz W. Hansen, Esq.

# 83 - 1086

APPENDIX

..co · Supreme Court, U.S
FILED
FEB 16 1984
ALEXANDER L. STEVAS,
CLERK

STATE OF NEW YORK

SUPREME COURT : COUNTY OF ALBANY

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IN THE MATTER OF TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

Petitioners,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, INDIVIDUALLY AND AS COMMISSIONERS OF THE STATE TAX COMMISSION,

Respondents.

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES.

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(Supreme Court, Albany County Special Term, April 16, 1982. Calendar No. 33)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

Lorentz W. Hansen, for petitioners.

Robert Abrams, Attorney-General
(Frank Dow of counsel), for
respondents.

COBB, J.

In this article 78 proceeding, wherein the petitioners seek judicial review of the State Tax Commission's determination of October 23, 1981 which upheld, in part, and modified, in part, certain notices of determination of additional sales and use taxes said to be due from petitioners, respondents move pursuant to CPLR 7804 (subd. [f]) to dismiss the instant proceeding upon the ground that it was not commenced within the four-month period described in CPLR 217 and section 1138 of the Tax Law and upon the further ground that the petitioners have failed to file the bond or deposit of the "amount of any tax sought to be reviewed" as demanded by section 1138 (subd. [a], par. 4) of the Tax Law.

Since it appears that the petitioners neither deposited the amount of tax at issue herein nor posted an appropriate undertaking as demanded by section 1138 (subd. [a], par. 4) of the Tax Law, this court lacks jurisdiction to entertain the instant proceeding and dismissal must be ordered whether or not it was timely instituted (Matter of J.C. Penney Co. v. New York State Tax Comm., 86 AD2d 705). Accordingly, the dismissal motion will be granted.

Submit order on notice.

Dated: August 6, 1982

All papers to attorney for respondents.

Supreme Court - Appellate Division

Third Judicial Department

May 12, 1983 44363

In the Matter of TOP TILE BUILDING SUPPLY CORP. ET AL., Appellants,

v.

NEW YORK STATE TAX COMMISSION et al., Respondents.

Appeal from a judgment of the Supreme Court at Special Term (Cobb, J.), entered September 20, 1982 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to annul a determination of the New York State Tax Commission which upheld in part and modified in part notices of determination of additional sales and use taxes due.

Following a formal hearing, respondents modified in part (in petitioners' favor) notices of determinations and

demands for payment of sales and use taxes due, and as modified, denied applications for revisions. Respondents' determination was made October 23, 1981 and, as appears from an affidavit in the record, the determination was served upon petitioners by certified mail sent the same day. These proceedings were commenced by service of a notice of petition and verified petition on February 26, 1982. Petitioners did not deposit the tax, penalty and interest due nor did they file an undertaking (Tax Law, § 1138, subd. [a], par. [4]). Special Term held that these omissions deprived the court of jurisdiction and dismissed the petition without reaching the issue of the timeliness of the proceeding.

Initially, we note that Special Term failed to address itself to those aspects of the petition which first attacked the constitutionality of section 1138 (subd.

[a], par. [4]) of the Tax Law and, in the amended petition, alleged violation of due process in the manner respondents construed the statute. The court limited its decision to finding that failure to pay the tax at issue or post an undertaking deprived the court of jurisdiction. While an article 78 proceeding is generally the proper vehicle to determine whether a statute, ordinance or regulation has been applied in an unconstitutional manner (Matter of Overhill Bldg. Co. v. Delany, 28 N Y 2d 449, 458), the rule is different when the issue is the constitutionality of legislative action (Matter of Kovarsky v. Housing & Development Admin. of City of N. Y., 31 N Y 2d 184, 191). It has consistently been held that a proceeding under article 78 is not the proper vehicle to test the constitutionality of legislative enactments (Press v.

County of Monroe, 50 N Y 2d 695, 702). However, this court may, and, in reliance on CPLR 103 (subd. [c]), does hereby remedy the procedural infirmity by converting the article 78 proceeding to a declaratory judgment action and thereupon reach the merits (Matter of Ames Volkswagen v. State Tax Comm., 47 N Y 2d 345). In our analysis, we find that this court has held that payment of the tax imposed and the filing of an undertaking are conditions precedent to the maintenance of judicial review of Tax Commission determinations and that non-compliance deprives the court of jurisdiction (Matter of J.C. Penney Co. v. New York State Tax Comm., 86 A D 2d 705, mot. for lv. to app. den. 56 N Y 2d 507; Matter of Cooper v. Tully, 79 A D 2d 757). Petitioners, in attempting to distinguish these two cases, contend that no constitutional issue appears to have been raised properly in either case.

However, in Matter of O'Driscoll v. State Tax Comm. (Supreme Ct., Albany County, October 28, 1980, KLEIN, J., affd. 86 A D 2d 721, app. dsmd. 56 N Y 2d 644), the constitutionality of the statute was squarely before the court and was upheld (see Matter of Western Electric Co. v. Taylor, 276 N.Y. 309; Matter of Hochman v. State Tax Comm., 68 Misc 2d 781). Since it is conceded that petitioner has failed to comply with statutory requirements, there can be no judicial review.

Petitioner's remaining arguments directed to the validity of the assessment, the hearing, the determination itself, and the timeliness of these proceedings, need not be reached.

Judgment modified, on the law, by adding thereto a provision declaring that the deposit and undertaking requirements of section 1138 (subd. [a], par. [4])

of the Tax Law are constitutional, and, as so modified, affirmed, with costs to respondents.

MAHONEY, P.J., SWEENEY, KANE, CASEY and WEISS, JJ., concur.

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court,
held at Court of Appeals Hall
in the City of Albany on the
fifteenth day of September A.D. 1983

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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3 Mo. No. 735

In the Matter of Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone, Richard Stone,

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vs.

New York State Tax Commission, et al.,

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For a Judgment &c.

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/s/ Joseph W. Bellacosa
Clerk of the Court

STATE OF NEW YORK
STATE TAX COMMISSION

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In the Matter of the Petition
of
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and NORMAN L. STONE and RICHARD STONE,
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1973.

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6. In February, 1974, the audit was assigned to auditor Donald Bryant of the Albany District Office. Mr. Bryant began his examination on October 28, 1974, and submitted his reports on November 5, 1975. The audit procedures used were as follows:

(a) The first phase of the audit of Top Tile involved the selection of two (2) one-week test periods, February 1-6, 1969 and September 1-7, 1971. A one-week test period, September 1-7, 1971, was selected for Top Carpet. The sales records of each corporation were examined and it was determined that both Top Tile and Top Carpet owed additional sales tax for the test period in the amounts of $129.57 and

$36.10 respectively. The result of the test period audits were used to calculate error ratios in the petitioner's reporting of sales tax. These error ratios were then projected over the full periods covered by the audits.

(b) In addition to using these test periods to calculate uncollected taxes, the auditor examined petitioners' daily sales sheets to determine unreported taxes. From these sheets the sales tax actually collected during the entire audit period was compared to the sales tax reported. It was determined that Top Tile had failed to report $31,951.45 in sales tax it had collected and Top Carpet had failed to report $2,625.69 in sales tax it had collected.

7. While the audits were being conducted, petitioners made their records available to Mr. Bryant. These included original sales invoices, original purchase

invoices, purchase journals, ledgers, and daily cash sheets. Because the audit covered an extended period and involved records of numerous stores, the documents made available to the auditor were voluminous.

8. Top Carpet was formed for the benefit of former employees of Top Tile. No shares of Top Carpet stock were given to Norman L. Stone or to Richard Stone. Top Tile provided bookkeeping and sales tax preparation assistance to Top Carpet. Neither Norman L. Stone nor Richard Stone were officers of Top Carpet.

9. Norman L. Stone was president of Top Tile and Richard Stone was treasurer of Top Tile. Both had major responsibility for the management and affairs of Top Tile.

CONCLUSIONS OF LAW

A. That the consent extending the period of limitations executed by Norman

Stone on behalf of Top Tile in November of 1973 was valid since he was an officer of that corporation and as such was authorized to sign such a consent. Therefore, no portion of the assessment included in the Notice of Determination issued to Top Tile was barred by the period of limitations provided by section 1147(b) of the Tax Law. However, the consent extending the period of limitation executed by Norman Stone on behalf of Top Carpet was invalid since he was neither an officer nor was he a person authorized by that corporation to sign such a consent.

B. That the Audit Division was justified in issuing estimated assessments against Top Tile and Top Carpet in November, 1973, since petitioners had repeatedly delayed in making their books and records available.

C. That section 1147(b) of the Tax Law provides that "no assessment of

additional tax shall be made after the expiration of more than three years from the date of the filing of a return". Since the Notice of Determination was issued against Top Carpet on November 20, 1973 and since no valid consents extending the period of limitations were executed, that portion of the assessment against Top Carpet relating to taxable quarters prior to September 1, 1970, must be cancelled.

D. That "Although there is statutory authority for the use of a 'test period' to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law, §1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit... However, if records are available from

which the exact amount of tax can be determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack of rational basis." Chartair, Inc. v. State Tax Commission, 411 N.Y.S.2d 41; therefore, the Audit Division was not justified in using the "test period" audit procedures described in Finding of Fact "6(a)" since petitioners had, by the time of the actual audits, made their books and records available to the auditor and these records were sufficient for determining the exact amount of tax due. Since these records were made available, only those portions of the assessments against Top Tile and Top Carpet which were based directly upon petitioners' records can be sustained. Those portions include the actual sales tax found to be due during the one and two week test periods of Top Carpet and Top Tile, and also the amounts of unreported

sales tax as were discovered by the audit procedures described in Finding of Fact "6(b)".

E. That Norman L. Stone and Richard Stone were persons required to collect tax for Top Tile with respect to section 1131 of the Tax Law. Norman L. Stone served as President of Top Tile and Richard Stone as Treasurer. Both had major responsibility for the management and affairs of Top Tile.

F. That Norman L. Stone and Richard Stone were not persons required to collect tax for Top Carpet with respect to section 1131 of the Tax Law. Neither Norman L. Stone nor Richard Stone served as an officer of Top Carpet.

G. That the petitions of Top Tile Building Supply Corp., Top Carpet Corp. and Norman L. Stone and Richard Stone, individually and as officers, are granted to the extent indicated in Conclusions of

Law "C", "D" and "F"; that the Audit Division is directed to modify the notices of determination issued on November 8, 1973, November 20, 1973 and April 2, 1976; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

OCT 23 1981

STATE TAX COMMISSION

/s/ James H. Tully, Jr.

PRESIDENT

/s/ Francis R. Koenig

COMMISSIONER

/s/ (signature illegible)

COMMISSIONER

SUPREME COURT - COUNTY OF ALBANY

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In the Matter of TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, individually and as members of the State Tax Commission,

Respondents.

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JUDGMENT

INDEX NO. 3381-82

Top Tile Building Supply Corporation, Top Carpet Corporation, Norman L. Stone, and Richard Stone, the Appellants herein represented by Lorentz W. Hansen, Esq., 175 Main Street, White Plains, New York 10601, having taken an appeal to the Court

of Appeals from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Appellate Division on the 13th day of May, 1983, and the Court of Appeals, after due deliberation, having rendered a decision on the 15th day of September, 1983, granting the Notice of Motion to Dismiss the appeal made by the appellants, ordering that the said motion to dismiss be and the same hereby is granted, with costs and twenty dollars costs of motion, and an order having been entered so affirming it is hereby:

ADJUDGED, that the aforesaid motion be, and the same hereby is denied, with costs of $85.00 to Respondents the New York State Tax Commission, the New York State Department of Taxation and Finance; James H. Tully, Jr., Milton Koerner, Thomas H. Lynch, individually and as

members of the State Tax Commission, Executive Bureau, State Campus, Tax and Finance Building, Albany, New York 12227, and that the Respondents have execution thereon.

/s/ Guy D. Paquin
Clerk

DATED AND ENTERED: Sept. 29, 1983

(SEAL) STATE OF NEW YORK )
ss.:
COUNTY OF ALBANY CLERK'S OFFICE)

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy JUDGMENT with the original thereof filed in this office on the 29 day of Sept 1983 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 29 day of Sept 1983

/s/ Guy D. Paquin Clerk

State of New York

Supreme Court - County of Albany

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In the Matter of TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

Petitioners-Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Commissioners of the State Tax Commission,

Respondents-Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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INDEX NO. 3381-82

NOTICE OF APPEAL

Sirs:

PLEASE TAKE NOTICE that the above named petitioners, Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone

and Richard Stone hereby appeal to the Supreme Court of the United States from the judgment in the above-captioned matter entered in the Supreme Court, County of Albany, State of New York on the 29th day of September, 1983, pursuant to an order of the New York Court of Appeals dismissing the petitioners appeal to that court, and from each and every part of the aforesaid judgment. Said appeal is taken pursuant to Title 28 United States Code. Section 1257(2).

Yours, etc.

Lorentz W. Hansen

cc: Attorney General, State of New York
c/o Francis V. Dow
Assistant Attorney General
Department of Law
Albany, N.Y. 12224

Certificate of Attorney

Filed: Supreme Court

Albany County, New York

and Appellate Division

Third Department

December 23, 1983

/s/ Lorentz W. Hansen, Esq.

No. 83-1086

IN THE

# Supreme Court of the United States

October Term, 1983

IN THE MATTER

OF

TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,
*Appellants,*

*against*

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Members of the State Tax Commission,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

## MOTION TO DISMISS OR AFFIRM

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*Assistant Attorney General*
*Of Counsel*

Dated: January 10, 1984

## Questions Presented.

1. Whether this appeal should be dismissed because the notice of appeal was not timely filed and the case was not docketed in this Court within the time for docketing.

2. Whether the appeal should be dismissed because the appellants did not raise a substantial Federal question in the court below.

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No. 83-1086

IN THE

**SUPREME COURT OF THE UNITED STATES,**

OCTOBER TERM, 1983.

IN THE MATTER

OF

TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

*Appellants,*

*against*

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, Jr., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Members of the State Tax Commission,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

**MOTION TO DISMISS OR AFFIRM.**

The appellees move the Court to dismiss the appeal herein on the ground that the notice of appeal was not timely filed and on the further ground that it is manifest that no substantial Federal question was raised in the court below.

**Statement of the Case.**

This appeal raises the question of the alleged deprivation of appellants' property without due process of law. A final administrative determination was issued and sent by certified mail to the appellants on October 23, 1981, by the New York State Tax Commission. The Commission held that appellants were liable for New York sales and use taxes, penalties and interest (Appendix). A proceeding was commenced on February 26, 1982 for judicial review of the determination in the New York Supreme Court, Albany County. The appellees moved for dismissal of proceeding on the grounds that the proceeding was not commenced within the four-month period of limitation set forth in New York Civil Practice Law and Rules, § 217 and Tax Law, § 1138 and that the appellants failed to comply with Tax Law, § 1138(a)(4) which required the appellants to file a bond or deposit with the Tax Commission a sum sufficient to cover the amount of tax, penalties and interest plus costs which may accrue against them in the proceeding prior to the commencement of the proceeding.

The Supreme Court dismissed the proceeding because of the failure of the appellants to file the required bond or deposit without reaching the time limitation question (Appendix, decision unreported). The appellants appealed the judgment entered on the decision of the Supreme Court to the Appellate Division, Third Department of the New York Supreme Court. That court modified the judgment

of the court below and as modified affirmed the judgment on the basis that the condition precedent for the commencement of the proceeding for the filing of an undertaking or deposit contained in Tax Law, § 1138, which the appellants failed to do, are constitutional. The court held that the validity of the assessment, the hearing, the Tax Commission determination of the timeliness of the proceeding for judicial review need not be reached (Appendix, reported 94 AD2d 885; 463 NYS2d 558).

The appellants appealed the order of the Appellate Division entered on that court's decision to the New York Court of Appeals. The appellees moved in that Court for dismissal of the appeal. The Court of Appeals by a decision, reported at 60 NY2d 653, and set forth in the addendum to this brief, and order both dated September 15, 1983 (Appendix) dismisssed the appeal upon the ground that the appellants were not aggrieved by the modification of the Appellate Division and that no substantial constitutional question was directly involved.

A judgment of the Supreme Court pursuant to the order of the Court of Appeals was entered in the Albany County Clerk's Office on September 29, 1983 (Appendix). An appeal to this Court was taken by filing a notice of appeal in the Albany County Clerk's Office on December 23, 1983 (Appendix).

**United States Statutes Involved.**

28 United States Code (Judiciary and Judicial Procedure), § 1257.

"Sec. 1257. State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 United States Code (Judiciary and Judicial Procedure), § 2101(a)(b)(c).

"Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in

part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interloctory, and within sixty days if final.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

**Rule of the United States Supreme Court Involved.**

"Rule 12. Docketing Cases

".1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U. S. C. §§ 1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U. S. C.

§ 2101(a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.

".2. For good cause shown, a Justice of this Court may extend the time for docketing a case for a period not exceeding 60 days. An application for extension of time within which to docket a case must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed, must have appended a copy of the opinion, must specify the date and place of filing of the notice of appeal and append a copy thereof, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42.2. and 43. Such applications are not favored."

**New York Statutes Involved.**

New York Tax Law, § 1138 provides in pertinent part:

"§ 1138. Determination of tax

"(a)(1) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors.

Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same.

"(2) Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days.

* * *

"(4) After the hearing provided for in paragraph one or three of this subdivision, the tax commission shall give notice promptly by registered or certified mail of its determination to the applicant. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and

interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereof stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application."

New York Tax Law, § 1147 provides in pertinent part:

"§ 1147. Notices and limitations of time

"(a)(1) Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to

whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

New York Civil Practice Law and Rules, § 217 provides in pertinent part:

> "217. Proceeding against body or officer; four months
>
> "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty * * *."

**Summary of Argument.**

The order of the New York Court of Appeals which is appealed in this case was entered on September 15, 1983. The notice of appeal was not filed until December 23, 1983, which is beyond the 90-day time limitation for appeals to this Court.

The New York procedural requirement for payment of sales taxes, penalties, interest and court costs for filing an undertaking for payment of them as a condition precedent to commencing a proceeding for judicial review of an administrative determination after an evidentiary hearing does not deprive appellants of due process of law. This Court in *Flora v. United States*, 357 US 63 (1958), on

reargument 362 US 145 (1960), and *Dodge v. Osborn*, 240 US 118 (1915), has upheld similar condition precedents for review of Federal tax deficiencies. In the light of these prior holdings, the appellants have failed to raise a substantial Federal question.

Additionally, the appellants failed to commence a timely proceeding in the New York Supreme Court for review of the administrative determination sustaining their tax liability. Their untimely proceeding in the New York Supreme Court has mooted the questions which they seek to present to this Court.

## ARGUMENT.

### POINT I.

**The appeal should be dismissed because the notice of appeal and the jurisdictional statement were not timely filed.**

In their notice of appeal, the appellants state that they are appealing from the judgment entered in the Supreme Court, County of Albany, State of New York on the 29th day of September, 1983, "pursuant to an order of the New York Court of Appeals dismissing the petitioners appeal to that court". 28 United States Code § 1257 (Judiciary and Judicial Procedure) provides that appeals are to be taken from the State's highest court from which the decision was rendered. The highest court in this case was the New York Court of Appeals and its decision and remittitur both were dated September 15, 1983. It was necessary that appellant file both the notice of appeal and the jurisdictional statement within 90 days of that date (28 USC 2101). The copy of the notice of appeal in this

jurisdictional statement is undated. However, the notice of appeal filed in the Albany County Clerk's Office on December 23, 1983 is dated December 22, 1983 which was more than 90 days after the Court of Appeals decision and remittitur. (See Addendum to this brief.) The jurisdictional statement was filed on December 28, 1983, even later.

Appellants appear to take the position that their appeal is from the judgment of the Supreme Court which was entered on September 29, 1983. The appeal is not taken from the judgment of the Supreme Court but from the highest court of the State which rendered its decision in the matter and in this case that was the New York Court of Appeals. This question was considered in *Department of Banking of Nebraska v. Pink*, 317 US 264 (1942), reh den 318 US 802 (1942). In that case this Court considered the question of when the time to appeal to the Supreme Court of the United States starts running from an order of a state appellate court where it directs a lower state court to enter a judgment based on its decision. This Court said (pp 267-268):

> "Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in

the one court or the other, since we have ample power to obtain it from either. *Alterton v. Fowler*, 91 U. S. 143, 146. In reliance upon the early decision in *Green v. Van Buskerk*, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under Sec. 237 of the Judicial Code, 28 U.S.C. Sec. 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower v. Fletcher*, 114 U.S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts v. Hoagland*, 105 U.S. 701, 702, and *Clark v. Williard*, 292 U.S. 112, 117-118. This rule applies with equal force to cases from New York in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of Sec. 237 of the Judicial Code, a final judgment reviewable here.

* * *

> "Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

Since the decision of the Court of Appeals in the instant case determined the matter and the Supreme Court entering a judgment on the remittitur was merely a ministerial act required by it under the mandate of the Court of Appeals, claimant's time to appeal ended 90 days after September 15, 1983, the date of the Court of Appeals judgment, and therefore the filing of the notice of appeal and the jurisdictional statement were not timely.

## POINT II.

**The appellants did not raise a substantial Federal question in the Court below.**

Under the provisions of New York Tax Law, § 1138, persons against whom a determination of liability for sales and use taxes have been issued may apply for an administrative evidentiary hearing by filing a petition with the New York State Tax Commission for a redetermination of that liability. At the conclusion of that hearing, the Tax Commission issues a final determination which can be reviewed by the New York courts for error, illegality or unconstitutionality or any other reason by bringing a proceeding in the nature of certiorari. Where the constitutionality of a statute is raised, the proceedings are converted into actions for declaratory judgments. The period of limitations remains the same. See *Solnick v. Whalen*, 49 NY2d 224 (1980), 425 NYS2d 68, 401 NE2d 190; *Press v.*

*County of Monroe*, 50 NY2d 695 (1980), 431 NYS2d 394, 409 NE2d 870. The proceeding must be commenced within four months after the giving of notice of the Tax Commission's determination. The four-month time limitation commences on the day that notice is sent by registered or certified mail to the applicant.

The statute provides for a condition precedent to the commencement of a proceeding for judicial review of such determinations.

A person seeking judicial review of such determinations must first deposit with the Tax Commission the amount of the tax sought to be reviewed with the penalties and interest thereon, if any, and file with the Tax Commission an undertaking issued by a surety company, in such amount as a Justice of the Supreme Court of New York shall approve to the effect that if such proceeding be dismissed or confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding. Such costs and charges rarely exceed $250. The applicant has the option instead of depositing the tax, penalty and interest, of filing an undertaking sufficient to cover the taxes, penalty and interest plus the costs and charges which may accrue in the proceeding.

The principle that a taxpayer seeking judicial review of a determination by the taxing authorities must pay first and litigate later has long been upheld by this Court. *Flora v. United States*, 357 US 63 (1958), on reargument 362 US 145 (1960); *Dodge v. Osborn*, 240 US 118 (1915). In *Flora*, it was recognized that there would be hardship cases but recognized that any amelioration is a matter for the Legislature and not for the courts. Here, the appellants were given free access to an evidentiary hearing before the

Tax Commission of which they availed themselves. That hearing was analogous to hearings before the United States Tax Court.

Even, assuming *arguendo* that the condition precedent for bringing a proceeding for judicial review deprives the appellants of property without due process of law, the appellants did not seek timely review. New York Civil Practice Law and Rules, § 217 and sections 1138(a) (4) and 1147(a) of the New York Tax Law provide that a proceeding brought against the State Tax Commission must be commenced within four months after the determination sought to be reviewed becomes final and binding on a taxpayer. In the present case, the determination of the Tax Commission sustaining sales and use taxes due from the appellants became final and binding on October 23, 1981 pursuant to sections 1138(a) (4) and 1147(a) of the Tax Law when the decision was sent to the petitioners by certified mail on that date. The four-month period when a CPLR Article 78 or declaratory judgment action proceeding could be brought for judicial review expired on February 23, 1982. The review proceeding was not initiated until Friday, February 26, 1982, which was three days late. As a result, it is submitted that the issues raised by the appellants are moot and even if this Court sustained their contentions that the procedural history of this case demonstrates that the determination of the State Tax Commission deprives the appellants of property without due process of law, they are not able to obtain the ultimate relief which they seek.*

*While courts below did not reach this issue as unnecessary (94 AD2d 885, 886), the New York cases make it clear that the determination was final even though the amount of tax due with interest is subsequently recomputed. *Mtr. of Corbisiero v. State Tax Commission*, 82 AD2d 990, 991 (3d Dept, 1981), 440 NYS2d 396, affd 56 NY2d 680 (1982), 451 NYS2d 716, 436 NE2d 1318.

## CONCLUSION.

**The appeal should be dismissed because of failure of the appellants to timely file their notice of appeal and raise a substantial Federal question.**

Dated: Albany, New York
January 10, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellees

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

FRANCIS V. DOW
Assistant Attorney General
of Counsel

## ADDENDUM.

### Decision of the New York State Court of Appeals.

In the Matter of TOP TILE BUILDING SUPPLY CORP. *et al.*, Appellants, v. NEW YORK STATE TAX COMMISSION *et al*, Respondents.

Submitted July 11, 1983; decided September 15, 1983

Reported below, 94 AD2d 885.

Motion to dismiss appeal granted and appeal dismissed, with costs and $20 costs of motion, upon the ground that the appellants are not aggrieved by the modification at the Appellate Division (CPLR 5601, subd [a], par [iii]), and that no substantial constitutional question is directly involved.

**Notice of Appeal, Dated December 22, 1983.**

STATE OF NEW YORK,

SUPREME COURT—COUNTY OF ALBANY.

IN THE MATTER

OF

TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

*Petitioners-Appellants,*

*against*

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, Jr., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Commissioners of the State Tax Commission,

*Respondents-Respondents.*

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Index No. 3381-82

Sirs:

PLEASE TAKE NOTICE that the above named petitioners, Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone and Richard Stone hereby appeal to the Supreme Court of the United States from the judgment in the above-captioned matter entered in the Supreme Court, County of Albany, State of New York on the 29th day of September, 1983, pursuant to an order of the New York Court of Appeals dismissing the petitioners appeal to that court, and from each and every part of the aforesaid judgment. Said appeal is taken pursuant to Title 28 United States Code. Section 1257(2).

Dated: White Plains, N.Y.
December 22, 1983

Yours, etc.

LORENTZ W. HANSEN

cc. Attorney General, State of New York
c/o Francis V. Dow
Assistant Attorney General
Department of Law
Albany, N.Y. 12224

New York State Tax Commission,
New York State Department of
Taxation and Finance,
James H. Tully, Jr., Milton
Koerner, Thomas H. Lynch,
members.
c/o Francis V. Dow
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Clerk of Supreme Court of Albany County
Albany County Courthouse
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Albany, N.Y. 12207

Clerk, Appellate Division, Third Department
Box 7288, Capitol Station
Albany, N.Y. 12224

**Certificate of Service.**

Lorentz W. Hansen hereby certifies as follows:

1. I am a member of the bar of New York State, and counsel for petitioners herein.

2. On December 22, 1983 I served copies of the attached notice of appeal on the following persons at the following addresses, by placing the copies in post paid properly addressed wrappers:

1. Attorney General, New York
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5. New York State Tax
   Commission, New York
   State Department of
   Taxation and Finance
   James H. Tully, Jr.
   Milton Koener, Thomas
   H. Lynch, members
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LORENTZ W. HANSEN
175 Main Street
White Plains, N. Y.
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State of New York
County of Albany Clerk's Office ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy notice of appeal with the original thereof filed in this office on the Dec day of 23 1983 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this Dec day of 30th 1983

GUY D. PAQUIN, Clerk

(Seal)

Office - Supreme Court, U.S.
FILED
FEB 16 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1086

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE MATTER OF TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

# MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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## STATUTES AND RULES INVOLVED

FEDERAL:

Federal Rules of Appellate Procedure

Title 28 USC 2101(c)

STATE:

Civil Practice Law and Rules

Tax Law: §200
§375
§690
§1090
§1138
§1147

REGULATIONS AND RULES:

Federal Rules of Appellate Procedure

Code of Rules and Regulations
of the State of New York,
Vol. 22 Judiciary (A)

OTHER AUTHORITIES:

Weinstein, Korn, Miller "New York Practice"

## SUPPLEMENTAL STATEMENT OF CASE

The actual determination fixing the amount of taxes, interest and penalties was dated November 12, 1981.

## POINT I.

### THE NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT WERE TIMELY FILED.

Title 28 USC 2101(c) provides that review shall be "...taken or applied for within 90 days after the entry of (such) judgment or decree" and Rule 500.13 of the Rules of the New York Court of Appeals provides that:

> "The remittitur of the Court, containing this Court's adjudication, together with the return papers filed with the Court, shall be sent to the clerk of the court of original instance or to the clerk of the court where the case is remitted, there to be proceeded upon according to law. Any order to be made and entered to effect the adjudication contained in

> this Court's remittitur, including an award of costs, is made, entered and enforced in the court of original instance or in the court where the case is remitted."

Nothing on the face of the New York Court of Appeals order granting appellees' motion to dismiss, a copy of which was contained in the Appendix of appellants' Jurisdictional Statement, indicated that any entry or filing would occur in the New York Court of Appeals,

which accords with the Rules of the New York Court of Appeals to the effect that any order effecting the adjudication by the New York Court of Appeals is to be made and entered in the lower court.

Conversely, the judgment of the New York Supreme Court, Albany County, showed

on its face that it had been entered on September 29, 1983.

The above described New York Court of Appeals rule relating to entry of orders in lower courts was added January 1, 1981. See Official Compilation of Codes, Rules and Regulations of the State of New York, Vol. 22 Judiciary (A) p. 1100. This provision was not in the rules of the New York Court of Appeals in effect in 1942 when Department of Banking v. Pink, 317 US 264 (1942) arose. The relevant provision then in effect simply read:

> "Rule XVI. Remittitur. The remittitur shall contain a copy of the judgment of this court

> and the return made by the Clerk below and shall be sealed with the seal and signed by the Clerk of this Court." Clevenger's Practice Manual, 1942, Baker, Voorhis and Mathew Bender.

Clearly the 1981 change in the phrasing of the remittitur rule of the New York Court of Appeals, together with the phrasing of 28 USC 2101(c) which refers to the "entry" of a judgment or decree, created a trap for the unconversant New York practitioner. This change occurred after the statement of the rules relating to the timeliness of applications for review of state court judgments contained in Department of Banking v. Pink, supra. That case actually dealt with a different question, namely whether a motion to amend the New York Court of Appeals remittitur extended the time to appeal. The actual petition in that case was untimely even if the date of entry of the lower court judgment

controlled. Department of Banking v. Pink, supra, pp. 265-266.

In addition to this change in the rules of the New York Court of Appeals, there has been a change in federal procedural rules. As of July 1, 1968, Rule 36 of the Federal Rules of Appellate Procedure required notice of entry of judgment to be given to the parties. See Scofield v. NLRB, 394 US 423, 427 (1969). New York practice actually requires that written notice of entry of a judgment be served on the other side in order to commence the 30-day period generally allowed for appeals. New York Civil Practice Act Section 5313.

Therefore appellants respectfully request this Court to follow the less restrictive

rule of Scofield v. NLRB, supra, as well as the plain language of 28 USC Section 2101(c) which speaks of the "...entry of such judgment or decree." Surely the granting of appellees' motion to dismiss the appeal to the New York Court of Appeals constituted an "order" not a "judgment or decree" in common legal parlance. As this Court said in Puget Sound Co. v. King County, 264 US 22 (1924):

> "It is apparent that however final the decision may be, it is not the judgment. It is said that the latter is a mere formal ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the State, which counsel seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress of September 6, 1916, supra, fixing the time in which writs of error must be applied for and allowed."

## POINT II.

### THE ARTICLE 78 PROCEEDING WAS TIMELY COMMENCED.

Appellants are not seeking a review of the State Tax Commission ruling herein, but are challenging the constitutionality of the hearing procedures followed by the State Tax Commission and of the review bond requirement in sales tax cases, contained in §1138 of the Tax Law. Therefore petitioners are not bound by the "esoterica" of §1138 proceedings, including §1147(a)(2). As Weinstein, Korn, Miller "New York Practice", puts it:

> "Similarly, litigants must comply with statutory or regulatory procedures as a prerequisite to seeking judicial relief. Because the action taken under a challenged provision may be a nullity, an attack on the jurisdiction or power of an administrative board or the validity or applicability of a statute or ordinance is exempted from this limitation." Volume 3, page 30-78, paragraph 3001.09(c).

In a recent case where a real

property taxpayer was bringing a challenge outside the usual scope of Article 7 of the Real Property Tax Law the New York Court of Appeals held that the short 30 day statute of limitations provided by Article 7 did not apply, but rather the normal 4 month period applicable to Article 78 proceedings. Dudley v. Kerwick, 52 NY2d 542 (1981). The Court of Appeals, in another case, stated this rule as follows:

> "To be sure, a tax assessment may be reviewed in a manner other than that provided by statute where the constitutionality of the statute is challenged or a claim is made that the statute by its own terms does not apply (citations omitted) and where the assessment is wholly fictitious and is made without any factual basis solely to extend a period of limitations." (citations omitted). Slater v. Gollman, 38 NY2d 1, 4 (1975). (Emphasis added.)

The above cases are controlling in the present situation since, as noted, petitioners are not seeking review of a

State Tax Commission decision but are alleging unconstitutional procedures and an unconstitutional statute.

The normal rule in Article 78 proceedings is undeniably that the 4 month statute of limitations begins to run on receipt of notice. Kurtz v. Krone, 43 M.2d 573 (S.C. 1964); Tuvim v. 10 E. 30 Corp., 75 M.2d 612, (S.C.N.Y. 1971) mod. in other respects 38 AD2d 895, aff'd 32 NY2d 541; Kordal v. Niesly, 66 M.2d 781 (S.C. Nassau 1971); Ridgel v. Lavine, 77 M.2d 21 (S.C. Queens 1973) and Weinstein, Korn, Miller, op.cit., Volume 8, page 78-106, paragraph 7804.02. Appellants did commence their Article 78 proceeding 4 months after receipt of notice, as appellees must concede, because of an intervening weekend.

Additionally, since appellants are attacking the constitutionality of the

review bond requirement of §1138 of the Tax Law, appellants should not bear any of the burdens of that section, including the stricter rule of §1147 pursuant to which the 4 month Statute of Limitations begins to run on mailing of notice. As the court said in U.S. v. Heller, 635 F.R.2d 848 (Temp. Emerg. Court of Appeals, 1980):

> "...it is a violation of due process to subject to a regulation's penalties one who is judicially litigating the validity of that regulation." Page 857.

This is the reverse side of the constitutional rule which bars a litigant from retaining the benefits of a statute while attacking the constitutionality of one of its important provisions. Fahey v. Mallonee, 332 US 245, 255 (1947). If, for example, §1138 and §1147 of the Tax Law provided a statute of limitations that was 3 days longer than §217 of the Civil

Practice Law and Rules, rather than 3 days shorter as is the case herein, appellants would not be allowed to attack the constitutionality of the bond requirement of §1138 while relying on its more generous period of limitations. By the same token, appellants should not be required to bear the ancillary burdens of a statute when challenging its basic constitutional validity.

In any event, §1138(a)(4) of the Tax Law provides that an Article 78 proceeding to review a State Tax Commission decision shall be commenced within 4 months of the giving of notice of the "determination" of the State Tax Commission. (§1138(a)(4) was formerly numbered §1138(a), see L. 1979, Ch. 714, Sec. 2 and L. 1981, Ch. 760, Sec. 1, Consolidated Laws Service, Cumulative Supplement, January 1982.)

By "determination" clearly is meant a ruling which sets forth the exact amount of the sales tax liability. Thus subdivision (a)(1) of the same section prescribes that:

> "...the amount of the tax due shall be determined by the tax commission..." (Emphasis added.)

and subdivision (a)(4), which permits an undertaking rather than a cash deposit if the appellant so elects, says:

> "...such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination." (Emphasis added.)

Clearly before this 4 month period begins to run the State Tax Commission must determine the amount of taxes, penalties and interest alleged to be owing, state such amount in its determination, and give the taxpayers notice of such determination. This was not done until the communication dated November 12, 1981

was prepared and sent out to the appellants herein by the State Tax Commission. The amount of the "...taxes, penalties and interest thereon..." was finally "...stated in such determination..." as set forth in the above-quoted language of §1138.

Use of the word "determination" to describe a computation of the dollars-and-cents amount of the sales tax liability, interest and penalties in question is not unique to the statute. In fact, appellees themselves use the word in this sense, as witnessed by the deficiency notices originally mailed to the appellants herein which are referred to on their faces as "Notices of Determination," and set forth in exact figures the amount of taxes, interest and penalties claimed to be owing. By contrast, the communication which

appellees now ask be deemed a "Determination" is clearly referred to on its face as a "Decision". Similarly, the covering letter to this communication dated October 23, 1981 advises, "Please take notice of the Decision of the State Tax Commission..." (emphasis added). Appellants are told in this letter to make further inquiries should they wish to know how much tax is due.

The legislative history of these terms clearly supports appellants' position. As already mentioned, neither the personal income tax nor the corporate franchise tax sections of the Tax Law require an undertaking as a prerequisite to court review. Tax Law Sections 690 and 1090. And in each case the applicable period within which to commence such court review commenced four months after notice of decision. Sections 690(a) and

1090(a). Prior to 1963 (in personal income tax cases) and 1964 (in corporate franchise tax cases), such undertakings were required. Section 375 Tax Law and Section 200 Tax Law (McKinney's 1966). These predecessor statutes provided that the applicable period within which to commence such court review commenced four months after notice of determination. Section 375 (old Article 16) and Section 200 (McKinney's 1966 volume 59) (Article 9, compare with new Article 27). Thus the legislature substituted the word "decision" for the word "determination" at the very time the review bond requirement was dropped. As previously noted, the legislature has continued to the present to use the word "determination" with respect to court appeals in sales tax cases in which, of course, the review bond requirement has not been dropped from the statute.

Clearly this is no coincidence, and the intention throughout has been to include in the finality requirement not only a decision that the taxpayer was or was not liable but also a determination of the amount of the taxpayer's liability for taxes, interest and penalties, whenever a review bond in the amount of the taxes, interest and penalties is called for. (Corbisiero v. State Tax Commission, 82 AD2d 990, aff'd 56 NY2d 680 (1982), cited by appellees, is not at all relevant). In any event, as noted previously appellants did commence this Article 78 proceeding 4 months from receipt of the Notice of Decision itself, all that New York law requires.

While not altogether pertinent, one of the main objections appellants have raised below was the complete disregard by appellees of the 3 year statute of

limitations on sales tax deficiencies. Appellees used a wholly-artificial assessment to extend this 3 year period to 9 years. As a result, the 1980 State Tax Commission hearing in this case was a costly exercise in futility from appellants' viewpoint, dealing with sales taxes allegedly accruing as far back as 1967. After thus tearing the 3 year statute of limitations out of the law books altogether, appellees now seek to rely on much shorter periods of limitation.

## POINT III.

### A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Section 1138 of the New York Tax Law required that appellants make a cash deposit in the amount of the taxes, interest and penalties allegedly owed, approximately $92,000.00, or file an undertaking

for that amount, which, as a practical matter would require collateral in the form of marketable securities equalling 125% of the amount of the undertaking. (In this regard appeal bonds are of course different from fiduciary bonds). Appellants would have to meet this requirement for court review even though the judgment was obtained without a fair hearing. This is not a case of hardship but of impossibility. Appellants believe that no person who has not had a fair hearing at some point should be required to live out his life with a $92,000 judgment hanging over him for taxes allegedly owed by a chain of 10 retail stores.

Respectfully submitted,

LORENTZ W. HANSEN
Counsel for Appellants

Dated: January 20, 1983
White Plains, New York